Supreme Court, U. S.
FILED
SEP 18 1979
MICHAEL RODAK, JR., CLERK

79-197

# In the Supreme Court of the United States

October Term, 1979

STAN SKOKO, RALPH GROENER and ROBERT SCHUMACHER, Board of County Commissioners, on behalf of CLACKAMAS COUNTY, OREGON, a Political Subdivision of the State of Oregon,

*Petitioners,*

v.

CECIL D. ANDRUS, SECRETARY OF THE INTERIOR OF THE UNITED STATES, and W. MICHAEL BLUMENTHAL, SECRETARY OF THE TREASURY OF THE UNITED STATES,

*Respondents,*

and

JEANETTE SIMERVILLE, LARRY CALLAHAN and DALE D. SCHROCK, Board of County Commissioners, on behalf of BENTON COUNTY, OREGON, et al,

*Intervenor-Respondents.*

## PETITIONERS' REPLY TO INTERVENORS-RESPONDENTS' BRIEF IN OPPOSITION

DONALD C. WALKER
2302 Lloyd Center,
Portland, OR 97232

KENNETH E. SHETTERLY
189 S. W. Academy,
Dallas, OR 97338

*Attorneys for Petitioners*

STEVENS-NESS LAW PUB. CO., PORTLAND, ORE. 799

## SUBJECT INDEX


| | Page |
|---|---|
| Petitioner's Reply to Intervenors-Respondents' Brief | 1 |
| Statutory Construction | 2 |
| Authorities on Construction Back-up Clackamas County | 4 |
| Analysis of McNary Act | 7 |
| Earlier Clackamas County Case Sound Precedent | 8 |
| Court Has Mandamus Jurisdiction | 10 |
| Other Relief Does Not Preclude Basic Rights | 12 |
| O&C Issue of Great Magnitude | 13 |
| Record of Intervenors Association of O&C Counties | 14 |
| Ninth Circuit Defies U.S. Supreme Court Decree | 15 |
| Conclusion | 18 |

## TABLE OF AUTHORITIES


*Cases* — Page

Clackamas County v. McKay, et al, 219 F.2d 479 (1954) ..... 3, 8, 10, 17

Lafferty v. Humphrey, 248 F.2d 82 ..... 9, 17

Langston v. U.S., 118 U.S. 389 ..... 2, 4

State Highway Comm. of Missouri v. Volpe, 347 F. Supp. 950 (1972) ..... 11

State of Minnesota v. Weinberger, Sec. of H.E.W., 359 F. Supp. 789 (1973) ..... 11

T.V.A. v. Hill, 437 U.S. 153, 98 S. Ct. 2279 ..... 4

U.S. v. O&C Railroad Co., 238 U.S. 393 ..... 3, 15, 16

U.S. v. Commonwealth of Pennsylvania, 394 F. Supp. 261 (1975), Aff. 533 F.2d 107 (1976) ..... 11

U.S. v. Jackson, 302 U.S. 628, 82 L. Ed. 488, 58 S. Ct. 390 ..... 6

U.S. v. Raynor, 302 U.S. 540, 82 L. Ed. 413, 58 S. Ct. 353, reh. den. 303 U.S. 665 ..... 5

*Statutes*

Chamberlain-Ferris Act 1916, 39 Stat. 218 ..... 3

28 U.S.C. § 1361 — Mandamus Statute ..... 10

McNary Act of 1937, 50 Stat. 874 ..... 3, 6, 7, 12, 13, 15

*Texts*

73 Am. Jur. 2d § 258 ..... 6

73 Am. Jur. 2d § 275 ..... 6

73 Am. Jur. 2d § 396 ..... 5


# In the Supreme Court
## of the United States

October Term, 1979

STAN SKOKO, RALPH GROENER and ROBERT SCHUMACHER, Board of County Commissioners, on behalf of CLACKAMAS COUNTY, OREGON, a Political Subdivision of the State of Oregon,

*Petitioners,*

v.

CECIL D. ANDRUS, SECRETARY OF THE INTERIOR OF THE UNITED STATES, and W. MICHAEL BLUMENTHAL, SECRETARY OF THE TREASURY OF THE UNITED STATES,

*Respondents,*

and

JEANETTE SIMERVILLE, LARRY CALLAHAN and DALE D. SCHROCK, Board of County Commissioners, on behalf of BENTON COUNTY, OREGON, et al,

*Intervenor-Respondents.*

## PETITIONERS' REPLY TO INTERVENORS-RESPONDENTS' BRIEF IN OPPOSITION

The intervening defendants, by their acquiesing to the practices of the Secretaries and not asserting Oregon's basic legal rights in the O&C lands, have sadly painted themselves into a very uncomfortable corner.

They have joined the federal defendants in this

suit just as they did unsuccessfully 25 years ago in opposing Clackamas County's position on the O&C lands. Now that the Ninth Circuit has erred seriously in pronouncing federal ownership over these lands, they belatedly realize they have an opinion that is impossible to live with.

The Ninth Circuit has said that the federal government has absolute ownership of the O&C lands. The intervenors, by claiming that is not an issue in this case, are attempting to isolate a constitutional fundamental of dual sovereignty from being used as an aid to statutory construction.

## STATUTORY CONSTRUCTION

In their brief, they protest that the sovereign rights contention is not an issue, but only statutory construction of the McNary Act is at stake. Clackamas County is challenging the erroneous construction of the appropriation bills in reference to the McNary Act, and in so doing have consistently pointed out the ordinary rules of construction:

(1) Appropriation bills cannot amend substantive legislation by implication or silence. *Langston* v. *U.S.*, 118 U.S. 389 at 393.

(2) Congressional history is important to show legislative intent;

(3) AND MOST IMPORTANT Tool of Construction: Where land has been divested from the federal



government and absolute title in a private party (the O&C Railroad Co.) 238 U.S. 393, at 434, then the sovereignty of Oregon attached and that sovereignty cannot be terminated or alienated by an Act of Congress. Applying the fundamentals of state sovereignty avoids an undesirable and unconstitutional construction.

It begs the question to say that the State of Oregon could challenge the question of sovereign rights, but when a subdivision of that sovereign, Clackamas County, urges that argument in the proper construction of the McNary Act, that the court should ignore such an important constitutional argument. Appropriation bills, wrongfully construed, cannot on appeal ignore historical and constitutional arguments that assist the court in the valid construction that harmonizes the substantive legislation with the appropriation bills. To not do so allows the appropriation bills in essence to become the substantive legislation by implication or silence.

The understanding of the O&C history clearly brings into focus the original intent of the granting acts and how that intent was perpetuated through historical changes that were recognized in the *U.S. v. O&C R.R. Co.*, supra, Chamberlain-Ferris Act, 39 Stat. 218 McNary Act, 50 Stat. 874, and *Clackamas County* v. *McKay*, 219 F.2d 479.

The passage of time should not dull these legal landmarks.

## AUTHORITIES ON CONSTRUCTION BACK UP CLACKAMAS COUNTY

Clackamas County has consistently cited *Langston* v. *U.S.*, supra which is a time-proven case declaring that appropriation bills cannot amend or repeal substantive legislation by implication. However, there is abundant authority in recent days which proclaims even more forcibly the same doctrine. See *T.V.A.* v. *Hill*, 437 U.S. 153, 98 S. Ct. 2279, at page 2299 (1978):

> "*The doctrine disfavoring repeals by implication 'applies with full vigor when . . . the subsequent legislation is an appropriations measure.'* Committee for Nuclear Responsibility v. Seaborg, 149 U.S. App. D.C. 380, 382, 463 F.2d 783, 785 (1971) (emphasis added); Environmental Defense Fund v. Froehlke, 473 F.2d 346, 355 (CA 8, 1972). This is perhaps an understatement since it would be more accurate to say that the policy applies with *even greater force* when the claimed repeal rests solely on an appropriations act. We recognize that both substantive enactments and appropriations measures are 'acts of Congress,' but the latter have the limited and specific purpose of providing funds for authorized programs. When voting on appropriations measures, legislators are entitled to operate under the assumption that the funds will be devoted to purposes which are lawful and not for any purpose forbidden. Without such an assurance, every appropriations measure would be pregnant with prospects of altering substantive legislation, repealing by implication any prior statute which might prohibit the expenditure. Not only would this lead to the absurd result of requiring Members to review exhaustively the background of every authorization before voting on an appropriation, but it would flout the very rules the Congress carefully adopted to avoid this need. House Rule XXI (2), for instance specifically provides:
>
> 'No appropriation shall be reported in any general appropriation bill, or be in order as an amendment thereto, for any expenditure not previously authorized by law, unless in continuation of appropriations for such public works as are already in progress. *Nor shall any provisions in any such bill or amendment thereto changing existing law be in order.*' (Emphasis added.)



See also Standing Rules of the Senate, Rule 16.4. Thus, to sustain petitioner's position, we would be obligated to assume that Congress meant to pro tanto repeal § 7 of the Act by means of a procedure expressly prohibited under the rules of Congress."

In reference to intervenors' contention that the question of dual sovereignty is not an issue, see 73 Am. Jur. 2d, § 275, at page 441, STATUTES:

> ". . . As in the case of all statutes, such interpretation should be adopted as will have due regard for, be in harmony with, and give effect to, the legislative intent."

See *U.S.* v. *Raynor*, 302 U.S. 540, 82 L. Ed. 413, 58 S. Ct. 353, rehearing denied 303 U.S. 665.

See also the statutory rule that undesirable consequences should be avoided.

See also 73 Am. Jur. 2d, § 258, page 427:

"It is generally regarded as permissable to consider the consequences of a proposed interpretation of a statute, where the act is ambiguous in terms and fairly susceptible of two constructions. Under such circumstances, it is presumed that undesirable consequences were not intended; to the contrary, it is presumed that the statute was intended to have the most beneficial operation that the language permits. . . ."

Diminishing Oregon's sovereignty is an undesirable result. The impairment of one state's rights is the seed of destruction to all.

Clackamas County believes that the appropriation bill is clear and that it does not in any way repeal, modify or amend paragraph (c), Title II of the McNary Act. However, if such an ambiguity does exist, then the rule just stated would be applicable, namely, that an appropriation bill should not be allowed to defeat a constitutional principle.

See also 73 Am. Jur. 2d, § 396, page 511, JUDICIAL POLICY:

"Repeals by implication are not favored. Thus, an an intent to repeal by implication, to be effective, *must appear clearly, manifestly, and with cogent force.* . . . Moreover, if two constructions are possible, that one will be adopted which operates to support the *earlier act* rather than to repeal it by implication."

See *U.S.* v. *Jackson*, 302 U.S. 628, 82 L. Ed. 488, 58 S. Ct. 390,



where the court stated that it would not hold to repeal if they can find reasonable ground to hold the contrary.

## ANALYSIS OF McNARY ACT

Title II of the McNary Act (50 Stat. 874), is the substantive legislation that provides the formula for the distribution of the O&C funds. There are three paragraphs:

(a) 50% to Counties;

(b) 25% to Counties unless there are reimbursable charges against fund due U.S. (Appropriation bills are reimbursable items);

(c) 25% to be available to administer the act. Any part of this fourth 25% not used for administration can be covered into general fund provided there are no reimbursable charges against the fund mentioned in (b) above.

The appropriation bills by express terms have appropriated a sum equal to the third 25% and made such an appropriation a reimbursable charge.

The appropriation bills do not eliminate the procedure of paragraph (c). It is still the substantive legislation. The Secretaries have a duty to obey this unchanged provision.

The Secretaries have for years disregarded paragraph (c) and have horizontally placed the surplus of the fourth 25% (par. c) into the general fund. The duty is to vertically take the surplus, through para-

graph (b), and first reduce the lien charges. By doing so, the surplus reduces the reimbursable charges, thereby freeing most of the third 25% for the Counties.

The honor of the United States is at stake. To improperly administer the fund, when there is not one penny's discretion, is to run roughshod over the rights of Oregon. The basic fundamental that recognizes dual sovereignty is one of the unique features of our great constitutional system that unites the sister states. To say that the principle is outside the issue of statutory construction is to reveal a callousness toward the principles of the UNION.

The Union will be upheld by adhering to this standard.

**EARLIER CLACKAMAS COUNTY CASE SOUND PRECEDENT**

The Intervenors neglect to cite *Clackamas County* v. *McKay*, 219 F.2d 479 (1954). This important case has great similarity to the legal issues of the present case.

On page 481 of that opinion, the court starts by saying:

> "This is a civil action brought in the U.S. District Court by Clackamas County on behalf of itself and 17 other so called land grant counties . . . seeking mandamus directed to the Secretary of Interior and Agriculture.
>
> "The controversy concerns the proceeds from the sale of timber from 472,000 acres of public land."



Mandamus was allowed, the relief granted, jurisdiction assumed and most of the arguments asserted here by the defendants were asserted there.

Just to clearly emphasize the similarity, *our* case reads as follows:

> "This is a civil action brought in the U.S. District Court by Clackamas County in behalf of itself and 17 other so called land grant counties seeking mandamus directed to Secretary of Interior and Secretary of Treasury.
>
> "The controversy concerns the proceeds from the sale of timber from 2.5 million acres of O&C lands."

Absolutely no difference in any legal sense. If mandamus was the correct procedure then, it is the correct procedure now. The 1954 case was compiled with by the Secretaries and the appeal to the U.S. Supreme Court was held moot because of this compliance.

It is truly incredible that the Intervenors ignore this "on all fours" case and quibble over jurisdiction and statutory construction. Could it be fear of reprisal from the federal government?

Another important case in this long controversy that is very supportive of Clackamas County and which the Intervenors strangely ignore is *Lafferty* v. *Humphrey*, 248 F.2d 82. At page 82 Judge Prettyman stated:

> "In our opinion and decision in that case (219 F.2d 479) we held that acts of Congress in 1916 and 1937 (McNary Act) imposed upon the various ex-

ecutive officials involved a mandatory duty to distribute to the Oregon counties the money accumulated in the special fund designated 'The Oregon and California land-grant fund'. We ordered a remand for proceedings in accordance with that view. That was on April 30, 1954."

The court has not only stated, but reiterated that mandamus is the proper procedure in the O&C fund cases.

## COURT HAS MANDAMUS JURISDICTION

The Intervenors also would prefer this to be resolved purely on a jurisdictional issue. This is a mandamus suit.

See 28 U.S.C. § 1361, page 24:

"The district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to plaintiff."

Again the Intervenors ignore the mandamus jurisdictional points of *Clackamas County* v. *McKay*, 219 F. 2d 479, where Clackamas County prevailed in a fact situation where the Secretaries failed to make the proper distribution. All the points of opposition that are asserted against Clackamas County now were asserted in that case:

(1) Sovereign immunity;

(2) Lack of mandamus jurisdiction;

(3) Federal government's claim of ownership.



There is ample authority for mandamus jurisdiction. See:

*State Highway Comm. of Missouri* v. *Volpe*, 347 F. Supp. 950 (1972);

*U.S.* v. *Commonwealth of Pennsylvania*, 394 F. Supp. 261 (1975) Aff. 533 F.2d 107 (1976);

*State of Minnesota* v. *Weinberger*, Sec. of H.E.W. 359 F. Supp. 789 (1973).

These cases support the provision that mandamus jurisdiction was allowed to enforce nondiscretionary duties of the Secretaries. The same defenses of the Court of Claims, sovereign immunity, citing the *Carter* v. *Seamans*' rule, and the Tucker Act, were all declared not to be applicable to this type of action.

In the *Commonwealth of Pennsylvania* case, on page 266, the court states:

"The implicit substance of the federal government's argument is that even if all the elements of mandamus were established, the writ could not issue merely because the duty owed involved government funds. This court finds no support for such reasoning either in logic or the case law."

For the Intervenors not to take comfort in the basic authorities which have been cited and where they can make absolutely no distinction corroborates the proposition that they are operating in an atmosphere of fear and not basing their defense on logic, legal reasoning or constitutional principles.

Clackamas County is only a small county and political overtones and political expediency have come close to drowning out the cries for legal and constitutional redress to an issue with great magnitude that involves the federal and state relationship.

## OTHER RELIEF DOES NOT PRECLUDE BASIC RIGHTS

The fact that Oregon can challenge the entire structure of the federal government's administering the O&C lands does not prevent Clackamas County from asserting those same basic and sound principles in a mandamus suit where the Secretaries are wrongfully construing the appropriation bills in reference to the McNary Act. The appropriation bills do not amend, modify or eliminate the machinery of paragraph (c) of Title II of the McNary Act.

Paragraph (c) reads:

> (c) "Twenty-five per centum to be available for the administration of this Act, in such annual amounts as the Congress shall from time to time determine. Any part of such per centum not used for administrative purposes shall be covered into the general fund of the United States. *Provided: That moneys covered into the Treasury in such manner shall be used to satisfy the reimbursable charges against the Oregon and California* land-grant fund mentioned in subsection (b) so long as any such change shall exist."

And by allowing paragraph (c) to be eliminated by silence is depriving the eighteen O&C Counties many millions of dollars to which they are justly entitled.



## O&C ISSUE OF GREAT MAGNITUDE

Past constitutional history reveals cases that had great precedent in the evolution of our constitutional system.

1803—Marbury v. Madison—Supreme Court ruled a law of Congress void.

1819—Dartmouth College case—corporation charter deemed a contract and impairment disallowed.

1819—McCulloch v. Maryland—State could not impair by taxation a federal function.

1824—Gibbons v. Ogden—Federal government to regulate interstate commerce.

1866—Ex parte Milligan—Rejection of military tribunals in regions where civilian courts existed.

To add to that list, Clackamas County v. Andrus, et al would be a constructive milestone and the enunciated and reaffirmed principle that would safeguard the Union would be "*that land once divested from the federal government and in title in a private party is subject to state sovereignty and cannot be recovered into the public domain by an act of Congress* and certainly the rights of the state cannot be diminished by an appropriation bill that attempts to repeal substantive legislation (Title II, par. (c) of the McNary Act) by implication.

## RECORD OF INTERVENORS
## ASSOCIATION OF O&C COUNTIES

The Intervenors represent fifteen counties of the eighteen, plus the Association of O&C Counties, which also has intervened as a party.

The Intervenor Association of O&C Counties is the quarterback for the remaining intervenors. It is interesting to note that none of the district attorneys for these counties, nor the county counsels, is speaking on their behalf on any particular whatsoever.

The Association of O&C Counties fought Clackamas County 25 years ago in the 1954 case and their failure to use the tools of that precedent to protect the rights of Oregon has to be one of the state's biggest riddles.

Intervenors' brief is mostly an argument supporting petitioner's cause. They also disagree with the Ninth Circuit's opinion declaring the federal government to be the owner of the O&C lands.

They urge that the questions of "soverign rights" and "beneficial interests" are not an issue in this case. They state that these matters "have not been the subject of testimony, evidence, adversary briefing or adversary argument."

These Intervenors, along with the Association of O&C Counties, moved for summary judgment. All the parties, plaintiff and defendant, stipulated before the court that it was submitted for final determination. By this Motion for summary judgment they concede that there are no genuine issues and the Complaint states



uncontroverted. An examination of the Complaint will reveal a detailed and historical sequence of events, both factual, including the statutes and prior judicial opinions. All of this leads to the point that the McNary Act has to be construed with its legislative and judicial past. If sovereign rights are involved, then that is an additional strong reason to urge such argument in the construction of the McNary Act and not, as the Intervenors suggest, to ignore it.

It is obvious that the Intervenors have a split personality. They agree with Clackamas County on sovereign rights, but still say that the Secretaries are construing the statutes correctly. They can't answer the point that the *appropriation bills cannot*, by implication, eliminate paragraph (c) of Title II of the McNary Act. Their two positions are contradictory. If one believes in the sovereign rights of Oregon, then to be consistent one would have to agree that the Secretaries cannot use the appropriation bills to place a surplus into the general fund of the United States. The substantive legislation states otherwise, as expressly provided in paragraph (c), Title II of the McNary Act.

The fact that the controversy rages is good cause for the U.S. Supreme Court to hear this case and to bring harmony to the federal-state relationship.

## NINTH CIRCUIT DEFIES U.S. SUPREME COURT DECREE
## 238 U.S. 393, 434

The 1915 ruling states that title is absolute in a private party, O&C Railroad — hence, state sovereignty

attaches. The Ninth Circuit opinion declaring federal ownership is an absolute defiance of that ruling. The wrongful construction of the appropriation bills has the practical effect of assuming a proprietary interest in the lands by the federal government and such practice is a defiance of the court's ruling. This phase of this long Odyssey of events is an additional reason for this court to assume jurisdiction and to grant certiorari.

It is extremely important for this court to determine if its former Decree in 238 U.S. 393 is being defied by the two Secretaries. The 1915 Decree provides for absolute ownership in the Oregon-California Railroad Co., which ipso facto makes the land sovereign to Oregon. To disregard this fundamental makes it easy for the secretaries to assume improper control of the O&C lands and to give undue emphasis to the appropriation bills at the expense of ignoring the substantive legislation.

In the lower court, the Association and other Intervenors stated as follows: (R-70)

> "The appropriation bills may be 'erroneous' as plaintiffs allege, but the 'secretaries' duty is to obey them.
>
> "The State of Oregon may have certain sovereign rights in the lands beyond the power of Congress. Perhaps the beneficial title to these lands is in the State. A suit against the secretaries is clearly not the appropriate procedure for determination of any such rights, and plaintiffs do not seek to enforce any such rights."



It is truly curious that the Intervenors ignore the 1954 case of *Clackamas County* v. *McKay*, supra, when it has all kinds of ammunition beneficial to them and to Clackamas County. See *Clackamas County* v. *McKay*, supra, at page 496, paragraph XII:

> ". . . But when those duties were all completed, and at the end of the year a balance remained in the Oregon and California land-grant fund in the Treasury, the Secretary had no discretion as to his action. He was specifically and unequivocally directed by the Congress to cause the distribution of that balance according to the terms of the statute. That function of the Secretary fell within the line of cases beginning with Marbury v. Madison, which we have cited. The courts can and should require him to comply with the congressional mandate."

That is a clear and concise statement that jurisdiction attaches to a similar situation and that the Secretaries can be reached by mandamus. The court should also realize that after the successful victory by Clackamas County in 1954 the Association of O&C Counties and all the intervenors fought Clackamas County for the payment of the reasonable attorney's fees for Clackamas County's special counsel, A. W. Lafferty. See *Lafferty* v. *Humphrey*, 248 F.2d 82. A. W. Lafferty, a former congressman from Oregon (1911-1915) had championed the O&C fight for over fifty years. The Intervenors also fought Clackamas County in that case and lost. Their record in protecting the rights of Oregon is not an enviable one.

The Association of O&C Counties is the motivating force of opposition to Clackamas County. Since they intervened along with the fifteen counties, they should be required to show where the decision to oppose Clackamas County was discussed and debated in open meetings of these various counties. They would be hard pressed to show any type of deliberation.

It is with sadness, not rancor, that these charges must be made about the Association of O&C Counties. The Association has not enlightened the people of Oregon.

Clackamas County has to fight a conspiracy of silence and fear. The "don't rock the boat" philosophy is not very courageous and is founded neither on law nor logic.

## CONCLUSION

The Constitution, the Mandamus statute, the legal authorities, all support Clackamas County's contention that the appropriation bills are being wrongfully construed. A grave injustice to Oregon, and the Union as well, will be done if this case is denied a hearing.

Respectfully submitted,

DONALD C. WALKER
2302 Lloyd Center
Portland, Oregon 97232
*Attorney for Petitioners*